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ABSTRACT

The Supreme Court in 1985 first addressed the issue of balance between a student's right to privacy as stated in the Fourth Amendment and school officials' need to maintain safety. This chapter summarizes the case, explores the meaning of the court opinion, and briefly discusses other issues. The case involved a 14-year-old girl (T.L.O.) whose purse was inspected for cigarettes by a vice principal, revealing marihuana. The girl argued that the search violated the Fourth Amendment and that her confession was tainted by the search. The Supreme Court reversed the state court's ruling that the search was unreasonable, stating that discovery of the marihuana resulted from the reasonable search for the cigarettes. The "T.L.O." opinion brought attention to meaning of the "reasonable grounds" standard and to the scope of a search. The standard appears to allow searching if a school official concludes there are reasonable grounds to suspect evidence. The "T.L.O." standard appears to invite extensive strip searching in high schools, though officials will undoubtedly be reluctant to exploit this leeway. Other issues include whether sniffs by dogs constitute a "search," when a student has conclusively given consent to a search, and how the exclusionary rule is to be applied. (CJH)

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Searching of Students after New Jersey v. T.L.O.

Tyll van Geel

Disciplining a student for an infraction of a school rule may legally only be accomplished if there is relevant evidence to support the conclusion that the student has violated the rule.[1] Gathering this evidence sometimes entails searching students and their lockers; thus the question arises: what limits are there on the authority of school officials to search? The question is inevitably one of balance. Should school officials remain free of the restraints of the fourth amendment in order to maximize their ability to maintain the order and safety of the school, or should they be restrained by the fourth amendment in order to protect the student's interest in privacy?[2] The Supreme Court addressed this question for the first time in January of 1985 in a case entitled *New Jersey v. T.L.O.*[3] This chapter begins with a summary of *T.L.O.* and then turns to an exploration of the meaning of the opinion and to a number of issues which the opinion does not address.

The Opinions in *New Jersey v. T.L.O.*

It all started when a teacher found two girls, including the 14-year-old T.L.O., smoking in a school lavatory. The teacher escorted the girls down to the principal's office where, under questioning by Assistant Vice Principal Choplick, one girl admitted she had been smoking. T.L.O., however, denied she had been smoking, and claimed she did not smoke at all. Mr. Choplick invited T.L.O. into his private office and demanded to see her purse. On opening the purse he found a package of cigarettes which he removed from the purse, revealing a package of cigarette rolling papers. Because such rolling papers were associated with the use of marihuana, Mr. Choplick suspected a closer examination of the purse would yield additional evidence of drug use. A further

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1. Disciplining a student without evidence that the student violated a school rule would be a violation of that student's right to procedural and, perhaps also, substantive due process.

2. The fourth amendment states: "The right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV.

3. 105 S. Ct. 733 (1985).

thorough search of the purse, including the opening of zippered compartments, revealed a small amount of marihuana, a pipe, a number of empty plastic bags, $40.98 in change and single dollar bills, an index card that appeared to be a list of students who owed money to T.L.O., and two letters further implicating T.L.O. in marihuana dealing. On the basis of this evidence, which was turned over to the police, and a confession by T.L.O., the state brought delinquency charges against T.L.O. Arguing that the search of her purse violated the fourth amendment, T.L.O. moved to suppress the evidence found in her purse, and the confession which she claimed was tainted by the allegedly unlawful search. The case ultimately reached the New Jersey Supreme Court which ruled: (1) the fourth amendment did apply to searches conducted by school officials; (2) a search warrant was not needed for a school official to search; (3) a warrantless search would be permissible if an official "has reasonable grounds to believe that a student possesses evidence of illegal activity or activity that would interfere with school discipline and order"; (4) the search of T.L.O. was impermissible under this standard because mere possession of cigarettes did not violate school rules and had no bearing on the accusation against her, and that Mr. Choplick did not have a reasonable suspicion that T.L.O. had cigarettes in her purse since no one had furnished him with information to that effect, and that the evidence he found when he removed the cigarettes did not justify extensive "rummaging" through the purse; therefore, (5) the evidence of drug dealing was not admissible in the criminal proceeding brought against T.L.O.[4].

On appeal Justice White writing for the majority of the Supreme Court agreed with the New Jersey Supreme Court that the fourth amendment did apply in the context of public schooling, that school officials did not need to obtain a warrant to search students, and that "the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search."[5]

> Determining the reasonableness of any search involves a twofold inquiry: first, one must consider "whether the ... action was justified at its inception," ... second, one must determine whether the search as actually conducted "was reasonably related in scope to the circumstances which justified the interference in the first place." Under ordinary circumstances, a search of a student by a teacher or other school official will be "justified at its inception" when there are reason-

4. *Id.* at 738.

5. *Id.* at 743-44. The Court concluded that since school officials acted as representatives of the state and "not merely as surrogates for the parents," the protections of the fourth amendment were available to students. Then, after balancing the student's interest in privacy and the school's "equally legitimate need to maintain an environment in which learning can take place," the Court concluded that to impose a warrant requirement "would unduly interfere with the maintenance of swift and informal disciplinary procedures needed in the schools." Balancing the same considerations, the Court concluded the usual requirement, that a search be based only on "probable cause" that a violation of law has occurred, needed to be modified.

> able grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school. Such a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.[6]

Based on this standard the Court reversed the New Jersey Supreme Court's conclusion that the search of T.L.O.'s purse was unreasonable. The Court first noted that there were two separate searches involved in the case, the search for the cigarettes and the second search for marihuana. "Although it is the fruits of the second search that are at issue here, the validity of the search for marihuana must depend on the reasonableness of the initial search for cigarettes, as there would have been no reason to suspect that T.L.O. possessed marihuana had the first search not taken place." The first search was reasonable, concluded the Court, because (1) possession of cigarettes was relevant in the sense that it helped to make more probable that she did violate the no smoking rule, and (2) because the teacher's accusation made reasonable the hypothesis T.L.O. was carrying cigarettes.[7] And, the Court concluded, the second search was reasonable because: (1) the picking up of the package of cigarettes was a natural reaction and not a constitutional violation; (2) the finding of the rolling papers in turn gave rise to a reasonable suspicion T.L.O. was carrying marihuana in her purse, justifying the search which turned up the pipe, plastic bags, and money; and (3) this finding in turn further justified the extension of the search to a separate zippered compartment which revealed the index cards, the contents of which further justified the examination of the letters which were also found in the compartment. Because the Court concluded the search was reasonable under all the circumstances it did not decide the question of whether evidence seized by a school in violation of the fourth amendment had to be excluded from either or both a criminal proceeding or a school disciplinary proceeding.

Justice Brennan, joined by Justice Marshall, concurred that the fourth amendment did apply in the public school context, but otherwise they dissented from the majority opinion.[8] Justice Brennan took the position that all full-scale searches could only proceed on a showing of probable cause, and that only in special cases could the search proceed without a warrant. He agreed that the warrant requirement was not appropriate in the public school context, but insisted that the probable cause standard ought to apply to the schoolhouse search. The majority's use of a

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6. *Id.* at 744.

7. It was irrelevant that other hypotheses, e.g., T.L.O. borrowed a cigarette from someone else to smoke, were also consistent with the teacher's accusation. The requirement of reasonable suspicion "is not a requirement of absolute certainty." *Id.* at 746.

8. *Id.* at 742. Justice Powell also wrote a separate opinion concurring in both the opinion and judgment. Justice Blackmun concurred only in the judgment of the majority opinion.

balancing test[9] to arrive at a different standard from the probable cause standard, he argued, was not supported by either precedent or policy. "[T]he Court fails to cite any case in which a full-scale intrusion upon privacy interests has been justified on less than probable cause."[10] Justice Brennan also argued that the new standard of the majority would lead to unwarranted intrusions on student privacy, was ill-defined and would leave officials uncertain as to their authority, and that, in contrast, the probable cause standard was clearer and would have provided school officials all the authority they needed to protect the school.

In dissent Justice Stevens argued for a standard different from both the traditional probable cause standard and the standard adopted by the majority. His central concern was that the standard adopted by the majority would permit the search of students when teachers and administrators suspect that "the search will reveal evidence of even the most trivial school regulation or precatory guideline for student behavior."[11] He urged the adoption of a standard that would permit searches when teachers and administrators "have reason to believe that the search will uncover *evidence that the student is violating the law or engaging in conduct that is seriously disruptive of school order, or the educational process.*"[12]

As important as majority opinion in *T.L.O.* is, it opens a number of significant questions. (1) What does the *T.L.O.* "reasonable grounds" standard mean? (2) What does the standard governing the scope of a search mean? After examining these two questions we shall turn to a brief discussion of a number of other questions the opinion does not address but which are crucial issues in the application of the fourth amendment to schools: Are there certain efforts to gather evidence in schools to which the fourth amendment does not apply because it is not a "search" within the meaning of the fourth amendment? Are there circumstances when "reasonable grounds" is not to be used and a more lenient or tougher standard is to be substituted? What standard is to be followed if the police are involved in the search? What rules should guide the determination of whether a student has consented to a search? Does the exclusionary rule apply to illegal searches conducted by school officials?

The Meaning of the *T.L.O.* Standard

Assuming the *T.L.O.* standard does determine the constitutionality of a particular search, the difficult question arises as to the meaning of that

9. *See supra* note 5 and accompanying text.

10. *Id.* at 753.

11. *Id.* at 763. He said that, "For the Court, a search for curlers and sunglasses in order to enforce the school dress code is apparently just as important as a search for evidence of heroin addiction or violent gang activity."

12. *Id.* (emphasis in original).

standard. It is important to stress at this point that the *T.L.O.* standard is a two-part test: first it must be determined that the search was justified at its inception, and second one must determine if the scope of the search itself was justified. In this section we examine the meaning of the test to be used in determining if the search was justified at its inception, the second prong will be examined later. It will be recalled that a search is justified if there are "reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school."

We begin by asking, reasonable grounds as to what? The way the standard is phrased it is clear that the mere fact there are grounds to believe a student has violated a school rule is not enough to provide a basis for a search. The standard requires that there be reasonable grounds that the search will turn up *evidence* of a violation. For example, if a student were caught cutting classes, thus violating a school rule, that by itself would not provide a basis for a search. In this instance there would be no grounds for believing the search would yield evidence tending to prove the violation. The majority in *T.L.O.* said that the search may be conducted for "relevant" evidence, and relevant evidence need not conclusively prove the ultimate fact in issue, i.e., was T.L.O. smoking in violation of school rules. Relevant evidence need only have "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[13] That is, the test is whether the evidence would lead a reasonable trier of facts (school official deciding a disciplinary case, or judge or jury deciding a juvenile offender case) to conclude that a fact is more probable than if that evidence were not available. The evidence would be irrelevant if one could not justify any reasonable inference from it as to the fact at issue.[14] For example, a search for cigarettes could not be justified in a case in which the student was accused of setting off the school's fire alarm.

Turning to a different problem, it is clear that the reasonable grounds test is an objective test. That is, the search would not be permissible merely because the school official subjectively believed that he or she had grounds for the search.[15] The question to be asked is whether a (hypothetical) reasonable school official would conclude there were reasonable grounds for conducting the search.[16] What is "reasonable grounds" is determined from the perspective of this (hypothetical) reasonable school official with skill and knowledge the ordinary person

13. New Jersey v. T.L.O., 105 S. Ct. at 746 (quoting Fed R. Evid. 401).
14. E. Cleary, McCormick on Evidence 544 §185 (1984).
15. Beck v. Ohio, 379 U.S. 89 (1964). The Supreme Court has said that the usual probable cause standard is an objective test.
16. It may be presumed this hypothetical school official has a certain amount of expertise which the lay person does not have with regard to, e.g., detecting the signs of drug use.

would not have. This suggests that the school official may have reasonable grounds, when in the same situation the lay person would not.[17]

We turn now to a closer examination of the notion of "reasonable grounds." One plausible interpretation of the *T.L.O.* standard is that it is merely designed to prohibit those searches undertaken without any evidence whatsoever supportive of a suspicion that the search will turn up evidence of a violation.[18] Under this interpretation, only the totally baseless search would be prohibited. However, a search would be permitted if, for example, *any one* of the following factors were present: the student makes a furtive gesture to his pocket as the teacher approaches; flight as the teacher approaches; the student flees as the teacher approaches; the student gives evasive or false answers to questions; a student makes many quick visits to a toilet facility; the student is present in an area of the school where drug dealing is known to occur; the student is found in the presence of a known drug dealer; the student is found in possession of an item associated with the use of drugs or marihuana; the student is observed placing something in a sock or shoe; or the student is found in a place where there is an odor of burnt marihuana.[19].

The difficulty, of course, with this interpretation of *T.L.O.* is that it would inevitably lead to the searching of many innocent pupils who just happen to, for example, make what appears to be a furtive gesture or who just happen to be in the toilet facilities where there is the lingering smell of marihuana smoke of other students. This would seem to suggest that the *T.L.O.* standard should be interpreted as having more bite.

The illumination of the meaning of the *T.L.O.* standard can be carried a step further by looking more closely at some of the common forms of evidence school officials might have available when deciding whether they may constitutionally proceed with a search. Perhaps the most significant source of information for school officials is the informant, e.g., other students who report information. No doubt *T.L.O.* would permit school officials to rely on information from "citizen informers"

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17. LaFave, Search & Seizure 462 §3.2 makes this point regarding the probable cause standard. Given the concern of the majority of the Court in T.L.O. for school security, it is likely it would also say that reasonable grounds is to be viewed from the standpoint of the reasonable, prudent teacher or administrator. It is important the law take advantage of their expertise. *But c.f.* United States v. Ortiz, 422 U.S. 891 (1975); Johnson v. United States, 333 U.S. 10 (1948); United States v. Rosario, 638 F.2d 460 (2d Cir. 1980).

18. 105 S. Ct. at n.96. The question of whether individualized suspicion is an essential element of the T.L.O. standard will be taken up below.

19. There are numerous student-search cases with facts similar to those listed in the text. *See, e.g.*, Bilbrey v. Brown, 738 F.2d 1462 (9th Cir. 1984); Tarter v. Raybuck, 742 F.2d 977 (6th Cir. 1984), *cert. denied*, 105 S. Ct. 1749 (1985); M. v. Board of Educ. of Ball-Chatham Community School Dist. No. 5, 429 F. Supp. 288 (S.D. Ill. 1977); State v. Young, 216 S.E.2d 586 (Ga. 1975) *cert. denied*, 423 U.S. 1039 (1975); *In re* L.L., 280 N.W.2d 343 (Wis. Ct. App. 1979); People v. Scott D., 358 N.Y.S.2d 403 (N.Y. 1974); *see* Commonwealth v. Dingfelt, 323 A.2d 145 (1974).

alone, without more evidence, to conduct a search.[20] Still one must be careful in relying on the citizen informer. In one case the school bus driver saw two students exchanging something on the school playground which the bus driver, suspecting drugs, reported to school officials. The Ninth Circuit Court of Appeals concluded the subsequent strip search, which turned up nothing, was constitutionally impermissible.[21] That case might be compared with another in which a student informed school officials he had seen other students passing back and forth what the student informer thought to be drugs. He also said one of these other students appeared to be in possession of a large amount of money.[22] In this case the subsequent pocket search did reveal drugs, and the court concluded the search was reasonably based on the information provided by the student source.

School officials may overhear conversations between students providing a basis for suspicion. But a search based only in this sort of evidence should only be undertaken with caution.[23]

Another widely used piece of evidence school officials rely on to justify a search is the furtive gesture and evasive move, i.e., the movement of the hand to the pocket as the school official approaches. *T.L.O.* should not be interpreted to say that a furtive gesture along would be sufficient grounds to search.[24] But a furtive gesture combined with other facts, e.g., the student is illegally out of class, or the student is known to have

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20. And in a case decided after the decision in T.L.O. a federal district court said an anonymous tip from a person from a person claiming to be a parent of a student in the high school provided adequate grounds to search. Martens v. District No. 220, 620 F. Supp. 29 (N.D. Ill. 1985). A number of school search cases which arose before *T.L.O.* involved student informers. M. v. Board of Educ. of Ball-Chatham Community School District No. 5, 429 F. Supp. 288 (S.D. Ill. 1977); *In re* C., 102 Cal. Rptr. 682 (Cal. Ct. App. 1972); *In re* G., 90 Cal. Rptr. 361 (Cal Ct. App. 1970); *In re* Donaldson, 75 Cal. Rptr. 220 (Cal Ct. App. 1969); *In re* Boykin, 237 N.E.2d 460 (Ill. 1968). The reasonableness of the search was upheld in all these cases. The information from a citizen informer is typically considered sufficient to meet even the tougher probable cause standard. *See* United States v. Harris, 403 U.S. 573 (1971). The reliability of such an informer not shown to have been involved in criminal activities is presumed and corroboration of the informant's reliability is not necessary. *In re* G., 90 Cal. Rptr. at 362.

21. Bilbrey v. Brown, 738 F.2d 1462 (9th Cir. 1984). But in one case a court said that though a telephone tip, that a student was carrying an illegal substance, to a school official from a security officer at a nearby Air Force base would not have met the probable cause standard but was sufficient to satisfy the reasonable suspicion standard. *In re* J.A., 406 N.E.2d 958 (Ill. Ct. App. 1980).

22. M. v Board of Educ. Ball-Chatham Community School Dist. No. 5, 429 F. Supp. 288 (S.D. Ill. 1977).

23. *Compare*, A.B. v. State, 440 So. 2d 500 (Fla. Dist. Ct. App. 1983), with State v. F.W.E., 360 So. 2d 148 (Fla. Dist. Ct. App. 1978).

24. In State v. Young, 216 S.E.2d 586 (Ga. 1975) *cert. denied*, 423 U.S. 1039 (1975) as the assistant principal approached a group of three students, one student jumped up, put something down, and ran his hand in his pants. A pocket search of all three students

experimented with drugs in the past, might well be a sufficient basis to search under *T.L.O.*[25]

A student's past record and reputation often play an important role in the decision to search. *T.L.O.* would at least stand for this much: the mere fact a student may have been disciplined for an offense in the past is not sufficient by itself to subject him to a search in the present.

The location in which a student is found may also contribute to a finding of reasonable grounds. Thus, if students are seen exchanging something in a location which is known to be a place used by students for smoking marihuana, the combination of the two factors together would seem to establish reasonable grounds on which to search.[26] This suggests that if the New York Court of Appeals had used the *T.L.O.* standard, the decision in *People v. Scott D.*[27] would have been different. In that case Scott, who had been under observation for six months for possible drug dealing based on information from confidential sources, was seen twice in the same morning within one hour entering a toilet room with a fellow student and exiting within 5 to 10 seconds. One of the fellow students reentered the toilet room and remained for some time. A search of Scott uncovered 13 envelopes of a white powder and a vial of pills. The court of appeals disallowed the search saying the entering of the toilet room produced only "equivocal suspicion;" the confidential information added little basis for a search because the basis of the sources of information or reliability of the source was not disclosed, and the information itself was merely that Scott was possibly dealing in drugs; and the fact Scott had been seen once eating lunch with another student suspected of drug dealing was all but "meaningless." It is difficult to believe the majority in *T.L.O.* would not have concluded that there were reasonable grounds to search, especially given what was written above about the use of informants.

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yielded marihuana in the pocket of Young, apparently not the student who jumped up. In a decision issued prior to *T.L.O.* the court upheld the search saying the restraints imposed by the fourth amendment on school officials were minimal. The decision in *T.L.O.* would seem to preclude this result today since the Court did not stress that the fourth amendment standards in public schools imposed only minimal restraints. The search of all three students and not just the student who made the furtive gesture raises a question left open in *T.L.O.*: whether individualized suspicion is an essential element of the reasonable grounds standard. New York. v. T.L.O., 105 S. St. at 744 n.8.

25. In State v. Baccino, 282 A.2d 869, (Del. 1971), a student illegally out of class *and* known to have experimented with drugs resisted the vice principal's taking of his coat in order to assure he would follow him back to the class. The vice principal grew suspicious and searched the coat finding ten packets of hashish. The search was upheld in a case decided before *T.L.O.*

In another case when a teacher approached a student he made several clutching motions to his shirt pocket. He was also unusually quiet. Other students eyed the student, and the student turned away as the teacher walked past. The teacher suspected that the student had a knife or razor blade in his pocket because he had taken such items from the student on previous occasions. The search revealed marihuana and was found to be based on "reasonable suspicion." *In re* L.L., 280 N.W.2d 343 (Wis. 1979).

26. Tarter v. Raybuck, 742 F.2d 977 (6th Cir. 1984), *cert. denied*, 105 S. Ct. 1749 (1985).

27. 315 N.E.2d 466 (N.Y. 1974).

We turn now to another typical law enforcement problem that can also arise in schools. School officials who are investigating a school violation obtain information concerning the violator which is sufficiently general that it does not point exclusively to one particular individual. For example, in *In re Dominic W.*[28] two students reported that upon completion of their gym class they returned to find their common gym locker had been broken into and a watch stolen and two five-dollar bills. One of the boys said three other boys from the same gym class, which consisted of some ninety students, had been hanging around the lockers before gym class. The assistant principal interviewed two of these three boys, and one of these boys said he was not involved and did not know of anybody else who was. Next the assistant principal interviewed the third boy. He requested that he empty his pockets, which he did, producing ten one-dollar bills and a pack of cigarettes. Then the assistant principal felt appellant's pocket, and when he reached into one of them found the stolen watch. The court ruled the search to be impermissible under the probable cause standard.

> In this case, the assistant principal clearly had insufficient information to lead a reasonably cautious person to believe that appellant committed the theft.
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> The unreasonable nature of the subject search is shown by the failure of the information provided to the assistant principal to place the appellant in a more suspicious light than any other gym student on the day of the incident. The information found in the record does nothing more than create a mere suspicion and thus does not constitute probable cause.[29]

May students who are found in a location in which marihuana smoke is detected be subjected to a search simply on the basis of having been found in the area? This is a difficult question which also raises the question of how likely must it be that evidence will be found on a particular student.[30] The courts which have applied the probable cause standard are divided. Some courts insist that the odor must be of burning and not merely burned marihuana (if it were merely the smell of burned marihuana it might be the smoke of marihuana smoked earlier by other people).[31] Other courts place more stress on the nature of the place: the principle seems to be that the more likely it is that innocent people are to be found in the location, the less basis there is for a probable cause finding. The *T.L.O.* standard is intended to be more lenient than the probable cause standard.[32]

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28. 426 A.2d 432 (1981).
29. *Id.* at 435.
30. *Id.* *See* text at n. 96.
31. People v. Hilber, 269 N.W.2d 159 (Mich. 1978).
32. In Nelson v. State, 319 So. 2d 154 (Fla. Dist. Ct. App. 1975) two boys were found near a tractor shed on school grounds where the odor of marihuana was detected. The search

We return now to the question of the canine sniff. Assuming that a canine sniff of a student is a search,[33] the central question is whether students may be sniffed without individualized suspicion that the student is in possession of drugs. We shall return to that question below. Thus, if we assume the student was properly exposed to the dog sniff and the dog alerts, does the alert itself provide reasonable grounds for a more extensive search? The answer would seem to be "yes," if there were proof of the reliability of the particular dog doing the search.[34]

Sight is the other sense that can come into play in determining reasonable grounds to search. Here also difficult problems arise: not every pill is an illegal substance; not every plastic bag contains marihuana; and cigarette papers are not used only for marihuana. The *T.L.O.* majority seems to have made clear that school officials may assume the worst regarding such items when it said that the discovery of the rolling papers "gave rise to the reasonable suspicion that T.L.O. was carrying marihuana as well as cigarettes in her purse."[35] But this may have been an easy case. Why would T.L.O. have both ready-made cigarettes and rolling papers in her purse? Even as to this easy case Justice Brennan wrote in dissent that the "mere presence without more of such a staple item of commerce is insufficient to warrant a person of reasonable caution in inferring" T.L.O. possessed marihuana.[36] Now, what if the purse had been opened, no cigarettes were found but the rolling papers were spotted? The majority seems to suggest that this alone would be sufficient to warrant a further search. There is a sufficiently strong connection between rolling papers and marihuana to warrant a suspicion. But if a student were seen holding a small brown paper bag that seemed to be filled with a soft object, would that by itself provide the basis for a permissible search? At this point we are beyond what *T.L.O.* permits. The evidence for finding reasonable grounds, of course, becomes stronger as we add additional elements—the exchange of money, a furtive gesture, a record of drug violations, etc.

Responses to questions which are evasive, unresponsive, conflicting, or which the school official judges to be implausible and even false would certainly contribute, along with other evidence to a finding of reasonable grounds.

To summarize, the first prong of the *T.L.O.* standard is an objective standard that would allow a search if a hypothetical reasonable school official with expertise in dealing with students, drugs, and other related matters would conclude he or she had reasonable grounds to suspect the

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yielded marihuana and a pipe. The court upheld the search on the basis of the "reasonable suspicion" standard.

33. Whether a canine sniff is a "search" within the meaning of the fourth amendment—if it is not, then the fourth amendment standards are not applicable—is a question not clearly settled, and will be briefly discussed below.

34. Horton v. Goose Creek Indep. School Dist., 690 F.2d 470 (5th Cir. 1982)(en banc), *cert. denied*, 103 S. Ct. 3536 (1983).

35. New Jersey v. T.L.O., 105 S. Ct. at 747.

36. *Id.* at 758.

student had relevant evidence on him or herself. The test precludes the baseless and random search, but it does seem to say that search behavior may be guided by a hypothetical school official whose suspicions are easily aroused. This hypothetical person whose behavior we may emulate (we need not be as suspicious and quick to search as our hypothetical school official[37]) is not naive, but neither is the official a total cynic. The hypothetical official wants to respect the privacy rights of the innocent, but would be willing to invade privacy rights if given some modest reasons to do so. Our hypothetical official would prefer to err somewhat on the side of excessive searching than on the side of insufficient searching. It is better in this hypothetical person's view to search some innocent pupils than to fail to search the guilty. Searching innocent students is considered to be an unfortunate side effect of the effort to maintain order, not a desirable technique for assuring a safe school. A reckless disregard of the privacy interests of students is not a part of the approach of our hypothetical school official.

The Scope of the Search

We turn now to the second prong of the *T.L.O.* test which deals with the scope of a search which was justified at its inception. The Court wrote that "a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction."[38] To analyze this test we divide it into two parts: (1) the requirement that the search be reasonably related to its objectives; and (2) not excessively intrusive. The first part of the test seems to suggest, for example, a strip search for cigarettes would be impermissible because it is unlikely students would sequester cigarettes in their undergarments. A strip search for drugs, however, may be appropriate. Similarly, a strip search for a gun would seem to be unnecessary since a gun could be detected by a patting down of the student and an examination of his or her satchels, purses, backpacks, etc.

The second part of the test is clearly intended to add a number of further qualifications which are not elaborated upon by the Court. The Court indicates the "nature of the infraction" has a bearing on the scope of the search, but what bearing is not spelled out. The most plausible interpretation would seem to be that infractions which do not pose a serious threat to the order of the school or safety of the other students

37. The majority wrote, "Of course, New Jersey may insist on a more demanding standard under its own Constitution or statutes. In that case, its courts would not purport to be applying the Fourth Amendment when they invalidate a search." New Jersey v. T.L.O., 105 S. Ct. at 745 n.10.

38. New Jersey v. T.L.O., 105 S. Ct. at 744.

do not warrant an extensive search such as a strip search.[39] Hence, strip searching students to find a few dollars of stolen money would be inappropriate.[40]

The Court also says the age of the student needs to be taken into consideration. Age may be relevant to the scope of a search in several ways. The younger the student, it might be argued, the less likely the student would have the "street-smarts" to sequester contraband in, for example, underwear. The Court may have also been assuming that an intrusive search is more disturbing and upsetting to younger students.[41] The younger student is more vulnerable to and defenseless against sexual abuse.

Last, the Court says the sex of the student needs to be taken into consideration. Assuming only females search females, and males search males, it would seem that of all the considerations listed by the Court, the sex of the student would be one of the least relevant in defining the appropriateness of the scope of the search. Perhaps the Court is making the assumption that female students would be more disturbed than male students over certain kinds of searches.[42] Or, perhaps the Court is assuming that female students would be more subject and vulnerable to sexual abuse by females searching them.

We might test and expand our understanding of the second prong of the *T.L.O.* test by asking several questions. First, once evidence of drug dealing had been found in T.L.O.'s purse, would a strip search of T.L.O. have been permitted? As suggested above, a strip search to discover cigarettes would not have been permitted, but a more intrusive search might have been warranted once the drug-related items were found in her purse. She was fourteen years old, not an elementary school child, and was involved in a serious infraction of school rules and law. It was possible she had hidden elsewhere on her person other drugs, hence a strip search would have been reasonably related to the object of the search. But it could be argued that once evidence of drug dealing had been found, the school did not need to proceed with a further search. Sufficient evidence was available to impose school discipline on T.L.O., and to have her prosecuted under New Jersey law. In other words, the

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39. Note, the majority specifically rejects the notion that the nature of the infraction has a bearing on whether the search is justified at its inception. The nature of the infraction only has a bearing on the scope of the search itself. 83 L.Ed. 2d at 735 n.9.

40. *Compare* Bellnier v. Lund, 438 F. Supp. 47 (N.D.N.Y. 1977) (in which the court said the strip searching of an entire fifth grade class in a search for $3 of allegedly stolen money was improper in the absence of facts particularizing which student might have possession of the money).

41. It is an empirical question as to whom the strip search would be more upsetting. The very young may not fully comprehend the situation, view it as a game, and, thus, not be upset. The older student may fully comprehend, and as a consequence be outraged and embarrassed at the same time. But one might also argue that the young would be psychologically more vulnerable and have fewer mental defenses to cope with such an invasion of their privacy.

42. One wonders if the Court is working under an unwarranted stereotype of female students.

question is whether school officials must only do the minimum amount of searching necessary in order to achieve the purposes of maintaining order and safety in the school. The "reasonably related" standard could be interpreted to imply such a limitation.

Now suppose T.L.O. had been discovered in the lavatory engaging in what appeared to be drug dealing instead of smoking a cigarette? Could school officials proceed as follows: begin with a search of her pockets and purse, and finding nothing, proceed to a strip search? The phrasing of the standards in the opinion seems to suggest this would be a permissible course of action.

We can test this conclusion by examining another case. Consider the case of a canine sniff. Assuming all fourth amendment requirements, if any, have been met in exposing the student to the dog, how extensive a search is permitted if the dog alerts? The Seventh Circuit affirmed the conclusion of the district court that the mere fact a dog alerted did not provide warrant for a strip search of a thirteen-year-old girl, but did provide warrant for a pocket search.[43] A dog-alert provided "reasonable suspicion" that the student possessed drugs, hence the pocket search was permitted. But the nude search went too far. The district court's opinion placed no stress on the fact that the student was a female and only thirteen, but stressed that canine dogs are reliable insofar as the animal "reacts only to the scent or odor of the marihuana plant, not the substance itself. There is always the possibility that one's clothing may have been inadvertently exposed to the pungent odor of the drug."[44] In affirming the Seventh Circuit placed more stress on the fact that the student was thirteen; and it called the nude search "a violation of any known principle of human decency," and "outrageous under 'settled indisputable principles of law.'"[45] All this seems to suggest an additional requirement for strip and nude searches – certitude beyond that provided by the "reasonable grounds" standard that something is hidden beneath the underclothing of the student. We might, thus, conclude under this analysis that a strip search of T.L.O., in the second and hypothetical case, would not have been permissible since a standard stronger than the reasonable grounds standard could not have been met.

The difficulty with this analysis is that the majority opinion provides no hint that it would require something more than the reasonable grounds standard to proceed with an intrusive search. The bifurcated nature of the test opens the door to strip searches of older students reasonably suspected of having evidence on them of a serious school infraction. Thus, in the canine sniff case, the T.L.O. approach would seem to permit a strip search (putting aside the issue of age) if an initial

43. Doe v. Renfrow, 631 F.2d 91 (7th Cir. 1980)(en banc), *affirming in part*, 475 F. Supp. 1012 (N.D. Ind. 1979).
44. 475 F. Supp. at 1024.
45. 631 F.2d at 93.

search of pockets, purses, etc. turned up nothing and the dog continued to alert.

This is a disturbing conclusion. If dog sniffs are not searches within the meaning of the fourth amendment, all high school students could be subjected to the sniffing of a dog, and upon the alerting of the dog, strip searched.[46] Indeed, any high school student reasonably suspected of concealing drugs or other evidence of drug dealing on their persons — take the case of a student who has been informed upon by another student — could be subjected to a strip search, especially if evidence were not found in their pockets, purses, bookbags, etc. A past history of having brought a knife into school and a furtive gesture, under this interpretation of *T.L.O.*, opens the door to a strip search. In short, *T.L.O.* appears to invite extensive strip searching in American high schools. Whether school officials will in fact exploit the leeway provided by *T.L.O.* is another question. There is reason to suspect that most school officials will be reluctant to engage in extensive strip-searching of their pupils.

Other Issues

Space does not permit a full exploration of a number of important issues not settled by *T.L.O.* but mention of them is warranted to round out the picture. First, do the *T.L.O.* standards apply to the search of student lockers? The Court in *T.L.O.* did not answer this question but said the answer turned on "whether a schoolchild has a legitimate expectation of privacy in lockers, desks or other school property provided for the storage of school supplies."[47] Suffice it to say that a majority of the lower courts to date have adopted the view that, since lockers are jointly controlled by the student and the school, the student does not have a reasonable expectation of privacy as to the locker.[48] Second, are sniffs by dogs a "search" within the meaning of the fourth amendment? Though it seems likely most courts would today agree that the sniff of a locker is not a search,[49] authority is split as to whether the

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46. If a dog-sniff is a search, the student could only be sniffed if there were reasonable grounds to believe he or she had drugs in his or her possession. If the dog alerted, that fact plus the information that led to the sniffing in the first place would seem clearly to provide a basis for a strip search of a high school student.

47. New Jersey v. T.L.O., 105 S. Ct. at 741 n.5.

48. Zamora v. Pomery, 639 F.2d 662 (10th Cir. 1981); People v. Overton, 249 N.E.2d 366 (N.Y. 1969); State v. Stein, 456 P.2d 1 (Kan. 1969). *Contra* State *ex rel.* T.L.O. v. Engerud, 463 A.2d 934, 943 (N.J. 1983) *reversed on other grounds*, 105 S. Ct. 733 (1985). In Horton v. Goose Creek Indep. School Dist., 690 F.2d 470 (5th Cir. 1982)(en banc), *cert. denied*, 103 S. Ct. 3536 (1983) the issue arose as to whether the use of dogs to detect illegal contraband in lockers and persons were searches. The court concluded that the sniffing of lockers was not a search but sniffing students was. The court reasoned that sniffing lockers would not cause students the kind of embarrassment sniffing their bodies would.

49. The Supreme Court has held that the sniffing of luggage is not a search. United States v. Place, 103 S. Ct. 2637 (1983). In Horton v. Goose Creek Indep. School Dist., 690 F.2d 470 (5th Cir. 1982)(en banc), *cert. denied*, 103 S. Ct. 3536 (1983), the court held that the use of dogs to sniff lockers was not a search, but their use in sniffing students was.

sniff of a student would be viewed as a "search."[50]

Are there circumstances in which searches may proceed in the absence of individualized suspicion that a particular student has evidence of a violation of a school rule or law on his or her person? The Court in *T.L.O.* specifically left this question open.[51] Thus we have no answer as to whether an airport style search for weapons of all students entering the school would be permissible. We can speculate, however, that in the special case of a school facing serious weapons problems that an airport style search would be upheld because the degree of invasion of privacy is minimal; because there is no detention; the search does not impose a stigma; it does not annoy, frighten or humiliate; and the need for the search is significant.[52] A dog sniff of all students can be more intrusive, embarrassing, and can involve the detention of students, hence, if it is a search, might not be allowed. Requiring drug tests of all students is even less likely to be upheld beause such tests are even more intrusive, and potentially embarrassing.

Does the higher probable cause standard apply if the police are in any way involved in a school search?[53] A plausible and reasonable answer would seem to be that the search should only be deemed a "police search" if the police initiate the search process, and actually arrive at the school to oversee and participate in the search by, for example, observing what school officials do in a quest for evidence relevant to a criminal or quasi-criminal prosecution. Several courts seem to have adopted a rule of this sort.[54] But other courts have said that a search remains a "school-official search" even though the police initiated and were involved in the search.[55]

The issue of when, as a matter of law, it can be concluded that a student has voluntarily given his or her consent to a search remains a relatively unexplored area of the law.[56]

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50. The lower courts are split on the question of whether sniffing students is a search. Two courts have held that it is not a search. Zamora v. Pomery, 639 F.2d 662 (10th Cir. 1981); Doe v. Renfrow, 631 F.2d 91 (7th Cir. 1980), *cert. denied*, 451 U.S. 1022 (1981). Two other courts have held that it is a search. Horton v. Goose Creek Indep. School Dist., 690 F.2d 470 (5th Cir. 1982)(en banc), *cert. denied*, 103 S. Ct. 3536 (1983); Jones v. Latexo Indep. School Dist., 499 F. Supp. 223 (E.D. Tex. 1980).

51. *New Jersey* v. T.L.O., 105 S. Ct. 733, 744 n.8 (1985).

52. *See* United States v. Alhardo, 496 F.2d 799 (2nd Cir. 1974); United States v. Davis, 482 F.2d 893 (9th Cir. 1973).

53. The lower courts have assumed that the police in searching students must abide by the probable cause standard. *See* State v. McKinnon, 558 P.2d 781 (Wash. 1977)(en banc); Piazzola v. Watkins, 316 F. Supp. 624 (M.D. Ala. 1970), *aff'd.*, 422 F.2d 284 (5th Cir. 1971).

54. Tarter v. Raybuck, 742 F.2d 977 (6th Cir. 1984) *cert denied*, 105 S. Ct. 1749 (1985); Martens v. Dist. No. 220, Board of Educ., 620 F. Supp. 29 (N.D. Ill. 1985); State v. McKinnon, 558 P.2d 781 (Wash. 1977)(en banc).

55. *See* People v. Overton, 249 N.E.2d 366, (N.Y. 1969); Zamora v. Pomery, 639 F.2d 662 (10th Cir. 1981). *Compare* Picha v. Wielgos, 410 F. Supp. 1214 (N.D. Ill. 1976).

56. *Compare* Tarter v. Raybuck, 742 F.2d 977 (6th Cir. 1984) *cert. denied*, 105 S. Ct. 1749 (1985); State v. Fennell, 360 So. 2d 907 (La. Ct. App. 1978); State v. Wingerd, 318 N.E.2d 866 (Ohio Ct. App. 1974); Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

Last, we turn to the exclusionary rule.[57] A majority of the lower courts have rejected the applicability of the exclusionary rule in school disciplinary hearings.[58] The courts are also split as to the use of the exclusionary rule to exclude evidence from a criminal proceed which had been illegally seized by school officials.[59] Apparently only one case has held that the exclusionary rule does serve to exclude evidence which had been illegally seized by the police from a school disciplinary proceeding.[60] There seems little doubt the rule would be used in connection with police searches leading to evidence used in a criminal prosecution.[61]

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57. The exclusionary rule as applied to searches by police of adults says that all evidence obtained by searches and seizures in violation of the Constitution is inadmissible in state and federal courts. Mapp. v. Ohio, 367 U.S. 643 (1961); Weeks v. United States, 232 U.S. 383 (1914).

Since the search in *T.L.O.* was found to be legal, the Court did not reach the question of the applicability of the exclusionary rule as regards school searches.

58. *Rejecting use of the rule:* Morale v. Grigel, 422 F. Supp. 988, 999-1001 (D.N.H. 1976); Speake v. Grantham, 317 F. Supp. 1253 (S.D. Miss. 1970), *aff'd*, 440 F.2d 1351 (5th Cir. 1971); Keene v. Rogers, 316 F. Supp. 217 (D. Me. 1970); Gordon v. Santa Ana Unified School Dist., 208 Cal. Rptr. 657 (Cal. Ct. App. 1984). *Applying the exclusionary rule:* Jones v. Latexo Indep. School Dist., 499 F. Supp. 223 (E.D. Tex. 1980); Smyth v. Lubbers, 398 F. Supp. 777 (W.D. Mich. 1975).

59. *Applying the exclusionary rule:* State *ex. rel.* T.L.O., 463 A.2d 934 (N.J. 1983), *reversed on other grounds*, New Jersey v. T.L.O., 105 S. Ct. 733 (1985); People v. Scott D., 315 N.E.2d 466, (N.Y. 1974). *Rejecting the exclusionary rule:* State v. Young, 216 S.E.2d 586 (Ga. 1975), *cert. denied*, 423 U.S. 1039 (1975)(dictum).

60. Caldwell v. Cannady, 340 F. Supp. 835 (N.D. Tex. 1972).

61. Mapp. v. Ohio, 367 U.S. 643 (1961).